Hon. Benjamin H. Settle
Hon. Theresa L. Fricke

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

M.L.,

Plaintiff,

v.

CRAIGSLIST, INC., ET AL.,

Defendants.

No. 3:19-cv-06153-BHD-TLF

CRAIGSLIST, INC.'S MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES

NOTE ON MOTION CALENDAR: February 28, 2020

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

craigslist began in 1995 as an email list for sharing information about events in and around the San Francisco Bay Area. It has since grown to be one of the world's largest online forums for local classified advertising. The service craigslist provides is mostly free to the public, and is relied upon by millions for finding housing, jobs, goods and services, and community information. The overwhelming majority of craigslist users have always been well-intentioned, law-abiding individuals using the platform for the legitimate purposes for which it was intended. But as in every human realm, no matter how vigilantly policed, there is a non-zero amount of unlawful activity. craigslist has a long history of working with law enforcement to address the small minority of users who seek to violate craigslist's Terms of Use ("TOU") and misuse its platform.

This case arises from the unlawful actions of a non-party, Sterling Hospedales,[1] and others who allegedly trafficked the plaintiff, M.L., for commercial sex. The First Amended Complaint ("FAC") alleges that Hospedales and others committed their crimes against M.L. over the course of several years, and that they created and posted advertisements on the *craigslist.org* website in or before March and April 2009. Those postings, which violated craigslist's TOU, directly led to Hospedales' arrest, conviction, and incarceration for his actions against M.L. It goes without saying that what Hospedales and M.L.'s other unidentified traffickers did was deplorable, and craigslist condemns any and all sexual exploitation of any kind.

This case does not, however, assert any civil claims against Hospedales or any other traffickers or johns who allegedly abused M.L. Instead, the FAC purports to assert claims against craigslist, on the theory that it should be held liable for the traffickers' misuse of craigslist's classified listings platform. M.L.'s claims against craigslist are not

[1] Hospedales is identified by name in the original Complaint, and described as the "trafficker" in the FAC.

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viable for at least three reasons, each of which independently warrants dismissal:

First, M.L.'s Washington state law claims against craigslist are barred by the applicable statutes of limitations. Those claims are all governed by three-year limitations periods, all of which expired years ago. The FAC lacks any factual allegations establishing that M.L.'s claims against craigslist are not time-barred by the plain application of the relevant statutes. Accordingly, the claims should be dismissed.

Second, federal law provides complete immunity for interactive computer service providers—including craigslist—from precisely the sort of state law claims asserted in the FAC. Specifically, because M.L.'s state law claims against craigslist all necessarily ask the Court to treat craigslist "as the publisher or speaker of . . . information provided by another" (e.g., Hospedales), they are barred by Section 230(c)(1) of the Communications Decency Act ("CDA"). 47 U.S.C. § 230(c)(1), (e)(3). The FAC establishes that Hospedales and other unnamed traffickers took the photographs, wrote the words, and developed the advertisements regarding M.L. The FAC further establishes that far from *requiring* those individuals to post such unlawful content on the craigslist website, craigslist *expressly prohibited* them from doing so. Thus, the allegations in the FAC establish that Section 230(c)(1)—and the long list of cases applying it to craigslist and others—requires dismissal of M.L.'s state claims against craigslist.[2]

Third, even if M.L.'s state law claims against craigslist were not independently barred by both the statutes of limitations and CDA § 230(c)(1), they should nevertheless be dismissed, along with M.L.'s purported federal claim under 18 U.S.C. § 1595, for failure to state a claim. *See* Fed. R. Civ. Proc. ("FRCP") 12(b)(6). The FAC does not and

[2] *See, e.g., Dart v. craigslist, Inc.*, 665 F. Supp. 2d 961, 966-70 (N.D. Ill. 2009) (barring claims based on third-party listings allegedly involving prostitution); *Chicago Lawyers' Comm. v. craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008) (affirming craigslist's immunity from claims based on third-party housing ads); *Gibson v. craigslist, Inc.*, No. 08 CIV. 7735 (RMB), 2009 WL 1704355 (S.D.N.Y. June 15, 2009) (dismissing claims based on third-party posts for unlawful product).

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cannot allege facts from which it can be plausibly inferred that M.L. can meet the necessary elements of her claims. Because the FAC relies, instead, on conclusory allegations and implausible inferences, it fails to state any claim against craigslist that satisfies the governing pleading standard.

For these reasons, and as explained in detail below, craigslist respectfully requests that the Court dismiss with prejudice all claims asserted against craigslist in the FAC.

II. STATEMENT OF FACTS[3]

craigslist is, and at the relevant time was, the owner and operator of a website that provides an online platform for third parties to post, browse, and search localized classifieds and other content submitted by other users. *See* FAC ¶¶ 16, 38, 39.

The craigslist website has long been used by tens of millions of people each month in the U.S. alone, to list or find jobs, housing, all manner of goods and services, activities, advice, and companionship. *See* FAC, ¶ 40; *see also Dart*, 665 F. Supp. 2d at 961 ("craigslist's users create and post over thirty million new classified advertisements each month for, among other things, jobs, housing, dating, used items, and community information.") (internal quotations omitted). To ensure that the vast quantity of user-submitted content is usable, the craigslist website is organized by geographic location and categorized by subject matter. *See* FAC, ¶¶ 41, 60. It is the user, not craigslist, who determines the content of any particular posting, as well as the category in which the posting is to be published. *See* FAC, ¶¶ 38, 69-74; *see also Dart*, 665 F. Supp. 2d at 962 ("craigslist created the categories, but its users create the content of the ads and select which categories their ads will appear in.").

During the relevant time period, the craigslist website had hundreds of different

[3] Citations to the FAC are not intended—and should not be construed—as admissions to the truth of the referenced allegations.

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subcategories within which a user could submit a posting. One subcategory was identified as "erotic services." *See* FAC, ¶ 41. As courts have recognized, there are a wide range of so-called "erotic" or "adult" services that are perfectly lawful and legal. *See, e.g.*, *Dart*, 665 F. Supp. 2d at 968 ("Plaintiff is simply wrong when he insists that these terms are all synonyms for illegal sexual services.").

Indeed, as the FAC repeatedly confirms, craigslist has always expressly prohibited its users from posting content "suggest[ing] sexual favors for money" in its TOU and other site "rules and guidelines," in the erotic services subcategory or elsewhere. *See* FAC, ¶¶ 38, 50, 54, 65. craigslist has always relied on its active community of users to assist in the moderation of content on the craigslist website by, among other things, "flag[ging]" posts that contain unlawful content and "report[ing] suspected exploitation of minors to the appropriate authorities." *See, e.g.*, FAC, Ex. 1 (postings with prominent links/instructions for users to flag and report).

Despite the best efforts of craigslist and its users, however, some individuals have been intent on misusing the craigslist website for unlawful purposes. M.L. alleges that she was trafficked by such individuals, including Hospedales and one or more other, unidentified, traffickers. *See* FAC, ¶¶ 37-38, 40, 69-75. Between March 23 and April 12, 2009, Hospedales allegedly posted five advertisements in craigslist's erotic services category relating to M.L., who was 17 years-old at the time. *Id.* According to the FAC, M.L. turned 18 at some point between April 12, 2009 and December 31, 2009. *See id.*, ¶ 149 (M.L. was "approximately 16 and 17 years of age" during 2007-2008 "calendar years").

Approximately ten years later, on July 26, 2019, M.L. filed this lawsuit, asserting claims against craigslist and others (but not any traffickers or johns). *See* FAC.

III. ARGUMENT AND AUTHORITIES

Dismissal of a purported claim to relief is appropriate under FRCP 12(b)(6) where

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the complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility only when the plaintiff pleads "factual content"—not just "[t]hreadbare recitals of the elements" or "conclusory statements"—that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (dismissal is proper where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory").

To avoid dismissal, a plaintiff must set forth sufficient factual allegations to raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. Thus, pleadings that only permit the Court to infer "the mere possibility of misconduct," are subject to dismissal. *Iqbal*, 556 U.S. at 679. Although the Court must accept all well-pleaded facts as true, it need not accept as true legal conclusions, and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Moreover, a complaint is subject to dismissal when an affirmative defense appears on its face. *See Jones v. Bock*, 549 U.S. 199, 215 (2007).

A. M.L.'s State Claims Are Time-Barred by the Statute(s) of Limitations.

Where it is clear from the complaint that a plaintiff's claims are time-barred by the applicable statute of limitations, such claims should be dismissed. *See, e.g., David v. Smith*, No. C19-898 MJP, 2019 WL 3842661, at *2-3 (W.D. Wash. Aug. 15, 2019) (dismissing plaintiff's claims because they "are barred by the statute of limitations"). Here, M.L.'s state law claims against craigslist plainly expired *years* ago.

Under Washington law, when a plaintiff seeks "recovery of damages for injury suffered as a result of childhood sexual abuse," the claims are time-barred unless they are brought within three years of: (a) the act alleged to have caused the injury; (b) the time the plaintiff discovered or reasonably should have discovered the injury was caused by the

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abuse; or (c) the time the plaintiff discovered that the abuse caused the injury for which the claim is brought. *See* RCW 4.16.340(1). Regardless of the triggering event, the three-year period cannot start running until the plaintiff turns eighteen. *See id*. Here, M.L.'s claims against craigslist are time-barred under all three potential methods of calculation:

First, the last act involving craigslist that was alleged to have caused M.L.'s injuries was Hospedales' post on April 12, 2009.[4] *See* FAC, ¶ 72. At some point thereafter, in the calendar year 2009, M.L. turned eighteen. *See* FAC, ¶ 149. Thus, the three-year time-bar imposed by RCW 4.16.340(1)(a) began running as to craigslist, at the latest, on December 31, 2009 and would have expired by December 31, 2012.

Second, RCW 4.16.340(1)(b) has been interpreted to "address[] repressed memory claims where the victim discovers his or her injury or condition was caused by a previously undiscovered act" of abuse. *See Hollmann v. Corcoran*, 89 Wn. App. 323, 334, 949 P.2d 386 (1997); *see also A.T. v. Everett Sch. Dist.*, 300 F. Supp. 3d 1243, 1255 n.4 (W.D. Wash. 2018). M.L. does not allege to have repressed any memories that led her, within the last three years, to discover the injuries caused by the actions of Hospedales or any other trafficker. Thus, RCW 4.16.340(1)(b) is inapplicable to the operation of the three-year period in which M.L. could have pursued her purported claims against craigslist.

Third, RCW 4.16.340(1)(c) provides that the three-year statute does not start running until the victim "discover[s] that the act [at issue in the complaint] caused the injury for which the claim is brought." Here, the FAC does not contain any factual

[4] The FAC makes the conclusory allegation that third-parties trafficked M.L. "beyond" her eighteenth birthday, including through misuse of the craigslist website. *See* FAC, ¶ 37. The FAC does not, however, provide any dates or details of any postings to the craigslist website after Hospedales' April 12, 2009 posting that led to his arrest. It bears noting, however, that even if the latest "date" of conduct alleged in the FAC relating to *any* of the Defendants—alleged trafficking at a Howard Johnson Inn in "2014"—were used to calculate the craigslist-specific limitations period, the three-year statutes would still have run by the end of 2017. *See* FAC, ¶ 25(a).

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allegations from which it can be reasonably inferred that M.L. discovered, within the last three years, that craigslist purportedly caused any of the injuries for which her claims have been brought.

Because the limitations periods that could potentially govern M.L.'s state claims against craigslist all expired years ago,[5] those claims (Counts 1-8) must be dismissed.

B. M.L.'s State Claims Are Barred by CDA section 230(c)(1).

CDA section 230 immunizes interactive computer service providers—including craigslist, as courts have repeatedly and uniformly recognized[6]—from any state claim that seeks to hold them liable for third-party content posted through their internet platforms. *See* 47 U.S.C. § 230(c)(1), (e)(3). Courts in the Ninth Circuit apply a three-part test to determine whether Section 230 immunity applies:

> Immunity from liability exists for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.

Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019) (internal quotations omitted).

When each element is satisfied, dismissal with prejudice at the pleading stage is warranted and appropriate. As articulated by the Ninth Circuit Court of Appeals,

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[5] To the extent any of M.L.'s claims are construed as *not* arising out of alleged childhood sexual abuse (removing it from RCW 4.16.340), the claims are still time-barred. *See, e.g.*, RCW 9A.82.100(7) (three-year SOL under WA Criminal Profiteering Act); RCW 4.16.080(3) (three-year SOL for unjust enrichment); RCW 4.16.080(2) (three-year SOL for claims not subject to another SOL); *Green v. A.P.C. (American Pharm. Co.)*, 136 Wn. 2d 87, 94-95, 960 P.2d 912 (1998) (negligence claim); *Milligan v. Thompson*, 90 Wn. App. 586, 592, 953 P.2d 112 (1998) (outrage); *Henningsen v. Worldcom, Inc.*, 102 Wn. App. 828, 845-45, 9 P.3d 948 (2000) (vicarious liability); *Azpitarte v. Sauve*, 188 Wn. App. 1016, 2016 WL 3766529, at *2 (2015) (unpublished) (civil conspiracy claims); *Oreskovich v. Eymann*, 129 Wn. App. 1032, 2005 WL 1885, at *2 (2005) (unpublished) (tort claims).

[6] *See supra* note 1; *see also Daniel v. Armslist, LLC*, 2019 WI 47, ¶¶ 5, 58, 386 Wis. 2d 449, 926 N.W.2d 710 (holding that § 230 required dismissal of claims against "a classified advertising website similar to craigslist").

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"[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008); *see also Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (Section 230 provides "immunity from suit rather than a mere defense to liability") (internal quotations omitted).

Here, M.L. seeks to hold craigslist liable for injuries resulting from content that Hospedales and other unidentified third parties created and posted to craigslist's online classified advertising platform. Because craigslist is a provider of an interactive computer service, not the publisher or speaker of the information provided by Hospedales or others, M.L.'s state law claims (Counts 1-8) should be dismissed with prejudice.

1. craigslist Is a Provider of an Interactive Computer Service.

An "interactive computer service" includes "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service." 47 U.S.C. § 230(f)(2). Website operators "are providers of interactive computer services within the meaning of Section 230." *Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *see also Roommates.com*, 521 F.3d at 1162 n.6 ("Today, the most common interactive computer services are websites.").

craigslist is the owner and operator of the "hugely popular Craigslist classified advertising website." FAC, ¶ 40. As such, craigslist readily qualifies as an interactive computer service under the test for CDA immunity, as many courts have already recognized. *See, e.g., Dart*, 665 F. Supp. 2d at 965 (undisputed "that Craigslist provides an 'interactive computer service' within the statute's meaning"); *Gibson*, 2009 WL 1704355 at *3 (same); *Chi. Lawyers'*, 519 F.3d at 669 (assuming without discussion that craigslist provides an "interactive computer service").

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2. craigslist Did Not Create the Content at Issue.

a. *The FAC Confirms that Third Parties Created the Postings.*

An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development" of the "information" at issue. 47 U.S.C. § 230(f)(3). It is abundantly clear, on the face of the FAC, that Hospedales and other third parties—not craigslist—were responsible for the creation and development of the "information" contained in the craigslist postings upon which M.L. bases her purported claims against craigslist. *See, e.g.*, FAC, ¶ 38 ("The trafficker took . . . photographs of M.L. . . . and used the photographs in conjunction with wording to create advertisements . . . ."); *id.*, ¶ 40 (confirming it was "the trafficker" who "develop[ed] the commercial sex advertisement" of M.L.).

There can be no dispute, in light of the plain allegations in the FAC, that Hospedales and other unnamed traffickers created the postings at issue. Because each of the relevant postings was developed by another information content provider—not craigslist—this element of immunity under CDA § 230(c)(1) is satisfied.

b. *The FAC Does Not and Cannot Allege That craigslist Is an Information Content Provider.*

In rare circumstances, an interactive computer service may act in such a manner that it becomes an information content provider with respect to particular information published on its platform. *See, e.g.*, *Roommates.com*, 521 F.3d at 1162 (explaining that a "website operator [can] be both a service provider and a content provider"). M.L. does not and cannot allege facts from which it can be reasonably inferred that such circumstances exist with respect to craigslist, which merely "passively displayed" content created by third-party actors. *See id.* at 1174.

(1) craigslist Did Not Contribute, Materially or Otherwise, to the Alleged Illegality of the Postings at Issue.

A service provider only becomes a content provider if it "materially contribut[es]

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to [the] alleged unlawfulness" of the content at issue. *Roommates.com*, 521 F.3d at 1167-68, 1175. This is a high bar, cleared only where the service provider "require[s] users to violate the law as a condition of posting," "compensate[s] for the posting of actionable speech," or "post[s] actionable content" itself. *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 414 (6th Cir. 2014). A material contribution "does not mean merely taking action that is necessary to the display of allegedly illegal content," such as providing a forum for third-party posts. *Id.* at 410.[7]

M.L. does not and cannot allege any facts showing that craigslist materially contributed to the unlawfulness of any of the postings through which M.L. was allegedly advertised. There is no allegation that craigslist *required* Hospedales or anyone else to post unlawful content. Nor could there be, as courts have recognized that "[n]othing in the service craigslist offers induces anyone to post any particular listing." *Chi. Lawyers'*, 519 F.3d at 671-72. In fact, the FAC concedes that, far from requiring Hospedales or others to post unlawful content, craigslist expressly *prohibited* them from doing so. *See, e.g.*, FAC, ¶ 50 (confirming that "[c]raigslist required that a post not directly suggest sexual favors for money").

Like the plaintiff in *Dart*—a case holding craigslist immune from liability for third-party postings published in the "erotic services" category circa 2009—M.L. alleges (and can only allege) facts showing that third parties defied craigslist's rules and policies and misused craigslist's neutral platform. As the *Dart* court said:

> Plaintiff's argument that Craigslist causes or induces illegal content is further undercut by the fact that Craigslist repeatedly warns users not to post such content. ***While we accept as true for purposes of this motion plaintiff's allegations that users routinely flout craigslist's guidelines, it***

[7] *Cf. Chi. Lawyers'*, 519 F.3d at 671 ("craigslist plays a causal role in the sense that no one could post a[n unlawful] ad if craigslist did not offer a forum. That is not, however, a useful definition of cause. One might as well say that people who save money 'cause' bank robbery, because if there were no banks there could be no bank robberies.")

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> ***is not because craigslist has caused them to do so***. Or if it has, it is only in the sense that no one could post unlawful content if craigslist did not offer a forum.

Dart, 665 F. Supp. 2d at 969 (emphasis added; internal citations and quotations omitted).

Providing neutral policies, features, and tools does not transform the website operator into a content provider for purposes of CDA § 230 immunity just because they could be misused. *See, e.g.*, *Roommates.com*, 521 F.3d at 1169 (providing "neutral tools" that may be used "to carry out what may be unlawful or illicit . . . does not amount to 'development'"); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 589 (S.D.N.Y. 2018) ("An [interactive computer service provider] may not be held liable for so-called 'neutral assistance' or tools and functionality that are available equally to bad actors and the [website's] intended users.") (internal citations omitted); *Daniel*, 386 Wis. 2d at 472 (2019) ("A defendant who provides a neutral tool that is subsequently used by a third party to create unlawful content will generally not be considered to have contributed to the content's unlawfulness.").

M.L.'s allegations regarding craigslist's neutral tools and policies, such as allowing users to post blurred or cropped images (FAC, ¶ 55), allowing the use of aliases (*id.*, ¶ 56), providing an email messaging relay system (*id.*, ¶ 42), organizing the site by geographical location and subject matter categories (*id.*, ¶¶ 41, 60), and allowing users to post photographs, contact information, and descriptions of their location (*id.*, ¶ 60), are legally insufficient to render craigslist a content provider, and have no effect on craigslist's immunity under CDA § 230(c)(1).[8] Notably, these are the same neutral tools

[8] The fact that the craigslist website contained an "erotic services" category does not alter the analysis. M.L. does not allege, nor could she, that all "erotic" services are illegal. *See Dart*, 665 F. Supp. 2d at 963, 968. Because the "erotic services" category could be, and was, used for lawful purposes, it was a "neutral tool" despite the fact that some users, such as Hospedales, misused it. *See, e.g.*, *Daniel*, 2019 WI 47, ¶ 32, 386 Wis. 2d 449, 926 N.W.2d 710 ("A 'neutral tool' in the CDA context is a feature provided by an interactive computer service provider that can 'be utilized for proper or improper purposes.'") (*quoting Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197 (N.D. Cal. 2009)); *see also Dart*, 665 F. Supp. at 962 ("[c]raigslist created the categories, but its users create the content of the ads and select which categories their ads will

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and policies that were in place when the *Dart* court applied CDA § 230 to bar the plaintiff's claims against craigslist. *See generally Dart*, 665 F. Supp. 2d 961.

(2) Allegations of Knowledge Are Irrelevant to CDA § 230.

M.L.'s allegations that craigslist may have been generally aware that some amount of unlawful content originating from third-parties was being posted on the site are irrelevant to the application of CDA § 230(c)(1) immunity. *See, e.g.*, FAC, ¶¶ 56, 60, 62, 64. Knowledge of third-party content—general or specific—does not make a service provider a content provider. *See, e.g.*, *Lycos*, 478 F.3d at 420 ("It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech."). craigslist did not create any of the alleged unlawful postings, regardless of whether it knew that third parties sometimes misused craigslist's services for improper ends despite craigslist efforts to enforce its TOU and to cooperate with law enforcement.

(3) Allegations of Profit Are Irrelevant to CDA § 230.

M.L. acknowledges that craigslist donated the posting fees from its erotic services category to charity. *See, e.g.*, FAC, ¶ 63. Elsewhere in the FAC, however, M.L. alleges that craigslist may have derived some profit or other indirect benefit from the publication of third-party content in the erotic services category. *See, e.g., id.*, ¶¶ 45, 47, 61, 63. In any event, whether or not "a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider 'creates' or 'develops' that content." *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *10 (N.D. Cal. Dec. 17, 2008). craigslist did not create or develop the postings at issue, and M.L.'s inconsistent and attenuated allegations regarding craigslist's supposed profits (or lack thereof) are legally irrelevant under CDA § 230.

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appear in.").

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3. M.L.'s Claims Attempt to Treat craigslist as the Publisher or Speaker of the Content-at-Issue.

Each of M.L.'s state law claims against craigslist seeks to hold it liable as the "publisher or speaker" of content originating from third parties. The gravamen of her claims is that craigslist allegedly failed to prevent and/or remove these third parties' posts. *See, e.g.*, FAC ¶ 53 (alleged failure to "develop[] effective requirements and monitoring methods"); *id.* ¶ 54 (alleged failure to "prevent[] the commercial sex"); *id.*, ¶ 70 (alleged failure to "protect or warn against her traffickers"); *see also id.*, ¶¶ 57, 62, 65.

The activities that M.L. alleges craigslist failed to perform—monitoring, regulating, maintaining, or policing content, including the decision not to do so—are traditional editorial functions of a publisher, for which a service provider cannot be liable. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, or postpone or alter content—are barred"). The same goes for the implementation of overall policies and determining the organization of a website, such as craigslist's geographical and topical organization functions. *Lycos*, 478 F.3d at 422 (website policies or decisions about how to treat third-party postings generally are editorial decisions, subject to Section 230 immunity).

M.L. cannot evade CDA § 230 by stating her allegations "in terms of [craigslist's] own [alleged] actions [and inactions], when the underlying basis for liability is unlawful third-party content published by [craigslist]." *Daniel*, 386 Wis. 2d at 477-78 (explaining what "matters is not the name of the cause of action . . . what matters is whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of the content of another") (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009)); *Dart*, 665 F. Supp. 2d at 968-69 (dismissing claims that craigslist "play[ed] a more active role than an intermediary or a traditional publisher" and finding that the

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complaint's "allegations plainly treat[ed] craigslist as the publisher or speaker of information created by its users"); *Barnes*, 570 F.3d at 1102-1103 ("a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory" or by placing a different label on "an action that is quintessentially that of a publisher"); *see also Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008) (claim that MySpace's failure to implement basic safety measures to protect minors derived from MySpace's status as the publisher of content provided by another).

In short, "[n]o matter how artfully" M.L. pleads her claims, it is "quite obvious that the underlying basis" of them is that third party postings led to her injuries.[9] *MySpace*, 528 F.3d at 419-20 (quoting *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007)). In other words, M.L.'s claims treat craigslist as the publisher or speaker of third parties' unlawful postings.

Because all three of the elements required for immunity under CDA § 230(c)(1) are satisfied, M.L.'s state law claims against craigslist (Counts 1-8) should be dismissed.

C. M.L. Fails to Plead Facts Supporting Necessary Elements of Her Purported Claims Against craigslist.

As detailed above, M.L.'s state law claims against craigslist should be dismissed on the independently dispositive grounds that they are barred by the statute of limitations and CDA § 230(c)(1). In addition to those grounds for dismissal, M.L.'s claims against craigslist should be dismissed for failure to plead facts supporting necessary elements of each claim.

[9] "[T]here will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." *Roommates.com*, 521 F.3d at 1174.

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1. M.L. Has Not Stated a Claim for Negligence (Count 1).

"A negligence action may only proceed if the plaintiff[] [has] shown that (1) a duty of care was owed to them by the defendant; (2) there was a breach of that duty; (3) that breach was the cause of their harm; and (4) they suffered injury as a result." *Zabka v. Bank of Am. Corp.*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005), *as amended* (Jan. 19, 2006). Here, M.L. does not and cannot plead facts showing that craigslist owed a legally cognizable duty or caused her harm. *See, e.g., Diffely v. Nationstar Mortg., LLC*, No. C17-1370 RSM, 2018 WL 1737780, at *12 (W.D. Wash. Apr. 11, 2018) (dismissing negligence claim for failure to plead facts demonstrating defendant owed plaintiff a duty); *McClellon v. Citigroup Glob. Markets, Inc.*, No. C18-0978-JCC, 2018 WL 5808440, at *5 (W.D. Wash. Nov. 6, 2018) (dismissing negligence claim because "the Court cannot infer an essential element of a claim that is not sufficiently pled").

First, "a private person does not have a duty to protect others from the criminal acts of third parties" unless "a special relationship exists between the defendant and the victim." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 199, 200, 943 P.2d 286 (1997), *as amended* (Oct. 1, 1997) (citation and quotation omitted); *see also Boy 1 v. Boy Scouts of Am.*, 832 F. Supp. 2d 1282, 1286–88 (W.D. Wash. 2011) (finding BSA owed no duty to protect scouts from scoutmaster's misconduct). M.L. does not allege facts demonstrating the existence of any special relationship between craigslist and herself, relying instead only on unavailing legal conclusions regarding an alleged duty. *See, e.g.*, FAC, ¶ 190.[10]

Second, a negligence claim requires more than just "but for" cause. A plaintiff has no viable negligence claim where "the connection between the ultimate result and the act

[10] Courts regularly dismiss negligence claims brought against website operators based on harm inflicted by a third-party, finding that no duty exists. *See, e.g., Beckman v. Match.com, LLC*, No. 2:13-CV-97 JCM (NJK), 2017 WL 1304288, at *4 (D. Nev. Mar. 10, 2017) (dismissing negligence claim where complaint failed to plausibly allege facts showing special relationship).

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of the defendant is too remote or insubstantial to impose liability." *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011). The FAC demonstrates that craigslist provided neutral tools that third parties allegedly misused. *See supra* Sec. III(B)(2)(b)(1). Thus, it was the unlawful actions of third parties—not craigslist's neutral tools—that proximately caused M.L.'s alleged harm. Indeed, while the Court may "accept as true for purposes of this motion plaintiff's allegations that users routinely flout craigslist's guidelines, it is not because craigslist has caused them to do so" and "if it has, it is only in the sense that no one could post unlawful content if craigslist did not offer a forum." *Dart*, 665 F. Supp. 2d at 969 (internal quotations omitted). That is not legally cognizable causation.

Because M.L. does not, and cannot, plead facts showing duty or causation, her negligence claim against craigslist should be dismissed.

2. M.L. Has Not Stated a Claim for Outrage (Count 2).

To state a claim for outrage, a plaintiff must plead facts showing "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Brower v. Ackerley*, 88 Wn. App. 87, 98, 943 P.2d 1141 (1997) (quoting *Rice v. Janovich*, 109 Wn.2d 48, 61, 747 P.2d 1230 (1987)). To satisfy the first element, a plaintiff must show that the defendant's conduct was "[s]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975) (internal quotations omitted); *see also Hunter v. Bank of Am., N.A.*, No. C16-1718 RAJ, 2019 WL 1115258, at *8 (W.D. Wash. Mar. 11, 2019) (dismissing outrage claim based on "formulaic recitation of the elements of a cause of action" that was "wholly insufficient to state a claim") (internal quotations omitted).

To be sure, the conduct of the third parties who bought and sold M.L. for

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commercial sex has no place in civilized society. But it is *craigslist's* alleged conduct—not theirs—that matters for purposes of this motion. craigslist's conduct consisted of providing a neutral platform that allowed people to create, post, browse, and search "over thirty million new classified advertisements each month for, among other things, jobs, housing, dating, used items, and community information." *Dart*, 665 F. Supp. 2d at 961 (internal quotations omitted). Indeed, the FAC demonstrates that craigslist implemented rules, guidelines, and policies to *prevent* and *prohibit* the third-party conduct underlying M.L.'s claims. *See, e.g.*, FAC, ¶ 50 ("[c]raigslist required that a post not directly suggest sexual favors for money"), ¶ 57 (craigslist required use of "credit card and telephone number" to post in erotic services category), Ex. 1 (postings with prominent links/instructions for users to flag and report).

Because M.L. does not and cannot allege extreme and outrageous conduct *by craigslist*, her claim against craigslist for outrage should be dismissed.

3. M.L. Has Not Stated a Claim for Criminal Profiteering (Counts 3, 8).

To state a claim under Washington's Criminal Profiteering Act, RCW 9A.82 *et seq*., a plaintiff must allege, among other things, facts demonstrating the existence of an "enterprise" in which the defendant knowingly participated to commit certain enumerated felonies as part of a pattern of profiteering activity. *See, e.g.*, RCW 9A.82.010(4), (8); *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 837-40, 355 P.3d 1100 (2015). The failure to allege facts establishing these elements is grounds for dismissal. *See, e.g., Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202, 1209 (W.D. Wash. 2013) (dismissing claim for failure to identify a criminal enterprise with specificity).

Here, like the plaintiff in *Trujillo*, M.L. fails to "identify an enterprise in her complaint," much less present facts establishing that craigslist is a knowing participant in any "ongoing organization, formal or informal" in which "the various associates function as a continuing unit." 183 Wn.2d at 839-40. At most, M.L. alleges that Hospedales and

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other craigslist users agreed—but failed—to comply with craigslist's TOU and other site rules and misused craigslist's neutral online platform. *See* FAC, ¶¶ 37-42, 69-74. M.L. does not and cannot allege that, out of the millions of postings across the hundreds of categories in the relevant timeframe, craigslist had any knowledge of the five or more postings through which ML was advertised. *See generally* FAC. Moreover, M.L.'s conclusory allegation that craigslist profited from those postings is undercut by the fact that craigslist donated the fees for those posts to charity. *See, e.g.*, FAC, ¶ 63. These defects are fatal to M.L.'s purported profiteering claims against craigslist, and those claims should be dismissed.

4. M.L. Has Not Stated a Claim Under SECA (Count 4).

M.L. claims that craigslist violated three provisions of the Sexual Exploitation of Children Act ("SECA"): RCW 9.68A.040 (sexual exploitation of a minor), RCW 9.68A.070 (possession of depictions of minors engaged in sexually explicit conduct), and RCW 9.68A.090 (communication with a minor for immoral purposes). FAC ¶ 206. But M.L. has not and cannot allege facts showing that craigslist violated these provisions.

First, the only provision of RCW 9.68A.040 that could even potentially apply to craigslist is subsection (1)(b), which would require craigslist to "aid[], invite[], employ[], authorize[], or cause[] [M.L.] to engage in sexually explicit conduct."[11] The words "aid, invite, employ, authorize or cause" each "requires some affirmative act of assistance, interaction, influence or communication on the part of a defendant which initiates and results in the child's display of sexually explicit conduct." *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). M.L. does not allege any affirmative act by craigslist that can

[11] Subsections (1)(a) and (1)(c) are plainly inapplicable to craigslist, the operator of an online classified advertising platform who is not alleged to have ever had any contact or interactions with M.L. *See* RCW 9.68A.040(1)(a) (making it a crime to "compel[] a minor by threat or force to engage in sexually explicit conduct"); RCW 9.68A.040(1)(c) (applying only to a "parent, legal guardian, or person having custody or control of a minor").

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be said to have caused M.L.'s "sexually explicit conduct." Instead, her allegations establish that craigslist merely provided neutral tools that third parties misused, in express violation of craigslist's TOU and other site rules. *See supra* Sec. III(B)(2)(b)(1). This falls short of alleging a violation of RCW 9.68A.040. *Id.*

Second, RCW 9.68A.070 criminalizes "knowingly possess[ing]" depictions of a minor engaged in sexually explicit conduct. M.L. does not allege that craigslist even possessed such depictions of M.L. The FAC merely alleges that the M.L.-related advertisements that third parties created and posted on the craigslist website were "accompanied by colored pictures of M.L." and the photographs showed that M.L. was a minor. *See* FAC, ¶¶ 38, 69. Not only does M.L. fail to allege the existence of the particular type of "depictions" prohibited by RCW 9.68A.070, but she fails to allege any "knowing" possession by craigslist of any of depictions of M.L. whatsoever. Again, there are no allegations suggesting that craigslist knew about the third party postings relating to M.L., out of the millions of postings across the hundreds of categories in the relevant timeframe.

Third, RCW 9.68A.090 requires a "communication with [a] minor for immoral purposes." There are no allegations that craigslist ever communicated with M.L. at all.

Because M.L. cannot allege facts establishing a violation of SECA by craigslist, M.L.'s SECA claim should be dismissed.

5. M.L. Cannot State a Claim for Ratification (Count 5).

M.L. purports to assert a claim for "ratification / vicarious liability." But these are not independent causes of action, but rather theories of liability. *See, e.g.*, *Banks v. Soc'y of St. Vincent De Paul*, 143 F. Supp. 3d 1097, 1104 (W.D. Wash. 2015); *Zellmer v. Constantine*, No. C10-1288 MJP, 2015 WL 1611939, at *3 (W.D. Wash. Apr. 9, 2015). Thus, to the extent M.L. asserts ratification or vicarious liability as a standalone claim, that claim should be dismissed with prejudice.

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Moreover, M.L. does not allege, nor could she, that craigslist had any legally cognizable agency relationship with the "pimps" or "sex traffickers" whom M.L. claims "sexually abus[ed] and exploit[ed]" her. FAC ¶ 210. Regardless, Washington law does not impose vicarious liability for sexual abuse or recognize a theory of "ratification" of sexual abuse. *See, e.g., C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn. 2d 699, 718-19, 985 P.2d 262 (1999) ("Neither current Washington case law nor considerations of public policy favor the imposition of respondeat superior or strict liability for an employee's intentional sexual misconduct"); *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 55, 929 P.2d 420 (1997) ("Vicarious liability for intentional or criminal actions of employees would be incompatible with recent Washington cases rejecting vicarious liability for sexual assault, even in cases involving recognized protective special relationships."). M.L.'s vicarious liability and ratification claim should be dismissed.

6. M.L. Fails to State a Claim for Unjust Enrichment (Count 6).

"A claim for unjust enrichment consists of three elements: (1) a plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge or appreciation of the benefit, and (3) the defendant's accepting or retaining the benefit without the payment of its value is inequitable under the circumstances of the case." *Austin v. Ettl*, 171 Wn. App. 82, 92, 286 P.3d 85 (2012).

M.L.'s unjust enrichment claim fails as to craigslist because she does not and cannot allege facts from which it can be reasonably inferred that craigslist had knowledge of the specific postings in question or any potential benefit to craigslist resulting from the postings. *See generally* FAC.

7. M.L. Fails to Allege a Civil Conspiracy (Count 7).

Civil conspiracy is not, by itself, an actionable claim. *See, e.g., W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 439, 438 P.2d 867 (1968). A plaintiff must show an underlying actionable claim which was accomplished by the conspiracy for the civil claim of

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conspiracy to be valid. *Id.*; *see also Nw. Laborers-Emp'rs Health & Sec. Trust Fund v. Phillip Morris, Inc.*, 58 F. Supp. 2d 1211, 1216 (W.D. Wash. 1999). Moreover, even assuming that M.L. had pled an underlying actionable claim based on the conduct of Hospedales or one of the Defendants, she fails to allege the necessary elements of a civil conspiracy involving craigslist. The elements of civil conspiracy are: "(1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *Wilson v. State*, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996).

M.L. does not and cannot plead facts showing that craigslist entered into an agreement with Hospedales or any other third-party to accomplish any unlawful purpose. At most, she alleges that, "[i]n March 2009, a Trafficker named Hospedales contracted with craigslist to advertise M.L. on its website." FAC, ¶¶ 69, 71. craigslist does not dispute that, by posting on the craigslist website, third parties including Hospedales agreed to abide by, and be bound by, the craigslist TOU. But these are not agreements to "accomplish an unlawful purpose" by any reasonable inference. Rather, these agreements are exactly the opposite—agreements that the third party users would not post any advertisements for commercial sex. *See, e.g.*, FAC, ¶ 50. The fact that third parties breached the agreement does not make craigslist a conspirator. There are no facts or allegations supporting a claim for civil conspiracy, and that "claim" should be dismissed. *See Kische USA LLC v. Simsek*, No. C16-0168JLR, 2016 WL 7212534, at *6–7 (W.D. Wash. Dec. 13, 2016) (dismissing civil conspiracy claim that failed to allege facts showing actionable agreement).

8. M.L. Fails to State a Claim Under 18 U.S.C. § 1595 (Count 9)

In the FAC, M.L. asserts a purported claim under 18 U.S.C. § 1595 ("Section 1595"). Section 1595 provides a civil remedy for an individual trafficked for commercial

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sex in violation of 18 U.S.C. § 1591 ("Section 1591"). To state a claim under Section 1595 against a particular defendant, a plaintiff must allege facts demonstrating that the defendant itself committed an underlying violation of Section 1591 *or* that the defendant knowingly benefitted by participating in a venture that the defendant knew or should have known committed an underlying violation of Section 1591. *See* 18 U.S.C. § 1595(a). Under either theory, a plaintiff's allegations must "meet the stringent *mens rea* standard required for liability under Sections . . . 1591, or 1595." *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185, 203 (D.D.C. 2018) (*rev'd on other grounds*, __ F.3d __, 2020 WL 398625 (D.C. Cir., Jan 24, 2020)); *see also Noble v. Weinstein*, 335 F. Supp. 3d 504, 525 (S.D.N.Y. 2018) (dismissing Section 1595 claims where allegations failed to show specific knowledge of particular unlawful acts). The "stringent" *mens rea* requirements under Sections 1591 and 1595 require specificity of knowledge regarding the alleged trafficking that M.L. does not and cannot plead with respect to craigslist.

First, M.L. does not and cannot plead facts from which it can be reasonably inferred that craigslist itself violated Section 1591. Section 1591(a)(1) makes it unlawful for anyone to knowingly recruit, entice, harbor, transport, provide, obtain, advertise, maintain, patronize, or solicit a minor for commercial sex. Section 1591(a)(2) also makes it unlawful to knowingly benefit from "participation in a venture" which has engaged in any of the above-enumerated acts. "Participation in a venture" is a defined term that "means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)." 18 U.S.C. § 1591(e)(4).

The knowledge requirement created by this statutory scheme is indeed a "stringent" one. *Woodhull*, 334 F. Supp. 3d at 203. As Congress expressly recognized, under Section 1591, "***general knowledge that sex trafficking occurs on a website will not suffice as the knowledge element must be proven as to a specific victim***." H.R. Rep. No. 115-572, pt. 1, at 5 (2018) (emphasis added); *see also Noble*, 335 F. Supp. 3d at 525

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(interpreting Section 1591 to require specific knowledge of illegal conduct and dismissing Section 1595 claim); *Canosa v. Ziff*, No. 18 Civ. 4115 (PAE), 2019 WL 498865, at *25 (S.D.N.Y. Jan. 28, 2019) (dismissing Section 1595 claim predicated on Section 1591 violation because defendant had only general knowledge of the alleged abuser's "pattern or practice of assault"). Moreover, the definition of "participation in a venture" is clear that specific knowledge of "***a*** violation" of Section 1591(a) is required, as opposed to mere knowledge of violations more generally. *See* 18 U.S.C. § 1591(e)(4) (emphasis added).

Because M.L. does not allege that craigslist engaged in any of the acts proscribed by Section 1591(a)(1), her only potential argument that craigslist itself violated Section 1591 would be through "participation in a venture" with Hospedales or the other unidentified traffickers to knowingly benefit from M.L.'s trafficking. The FAC alleges that Hospedales and other unidentified traffickers had a sex trafficking venture targeting M.L. The FAC does not, however, allege any facts from which it can be reasonably inferred that craigslist "knowingly" assisted, supported, or facilitated that venture. 18 U.S.C. § 1591(e)(4). Indeed, it is implausible to infer from the allegations in the FAC that out of the millions of postings across the hundreds of categories in the relevant timeframe, craigslist had *any* specific knowledge whatsoever regarding the misuse of the craigslist website by M.L.'s traffickers, much less that craigslist knowingly *assisted*, *supported*, or *facilitated* such misuse. At most, the FAC alleges that craigslist may have been generally aware that some amount of unlawful content originating from third parties was being posted on the site, despite craigslist's prohibitions against it. *See, e.g.*, FAC, ¶¶ 56, 60, 62, 64. Such allegations fail to state a Section 1595 claim against craigslist predicated on a Section 1591 violation by craigslist.

Second, because M.L. cannot allege a violation of Section 1591 by craigslist, her Section 1595 claim must seek to hold craigslist liable for a violation of Section 1591 by a

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third party. To survive dismissal under this theory, M.L. must plead facts demonstrating that craigslist (1) participated in a venture with such a third party, (2) knew of should have known that the third party engaged in "an act" in violation of Section 1591(a), and (3) knowingly benefitted from such participation. 18 U.S.C. § 1595(a). M.L. does not and cannot allege facts that satisfy these elements. As noted above, the FAC is devoid of factual allegations regarding craigslist that meet the statutory definition of "participation in a venture" provided in Section 1591(e). Indeed, craigslist cannot be said to have participated in a venture with M.L.'s traffickers, under *any* reasonable definition of that phrase, simply because it provided a neutral platform and neutral tools that M.L.'s traffickers misused in direct violation of craigslist's TOU. *Cf. United States v. Afyare*, 632 F. App'x 272, 286 (6th Cir. 2016) (holding that "participation in a venture" requires that defendant "actually participate and commit some overt act that further the sex trafficking aspect of the venture" and "negative acquiescence" is not enough). The FAC also fails to allege facts from which it can be reasonably inferred that craigslist benefitted, much less "knowingly benefitted," from the postings regarding M.L.

In short, M.L. does not and cannot allege facts from which it can be reasonably inferred that craigslist meets the exacting *mens rea* requirements under Sections 1591 and 1595. The Section 1595 claim should be dismissed.

IV. CONCLUSION

For the foregoing reasons, craigslist respectfully requests that the Court dismiss with prejudice all claims against craigslist asserted in the First Amended Complaint.

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DATED this 3rd day of February 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record who receives CM/ECF notification.

DATED this 3rd day of February 2020.

By: s/Avi J. Lipman
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